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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-273

AFFILIATED FUND, INC., LORD, ABBETT & CO., ROBERT S. DRISCOLL and ALVIN H. BERNDT,
Petitioners,

v.

PAULETTE PAPILSKY,
Respondent.

AFFILIATED FUND, INC., LORD, ABBETT & CO., ROBERT S. DRISCOLL and ALVIN H. BERNDT,
Petitioners,

v.

HARRY LEVINE,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND SUPPLEMENTARY APPENDIX

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PRELIMINARY STATEMENT

Respondents do not deny that it would be a serious abuse for an Affiliated Fund, Inc. ("Fund") shareholder to make up sham allegations that Fund's unaffiliated directors are dominated and controlled in order to bypass the common law director demand requirement codified in Rule 23.1, Fed. R. Civ. P. Toleration of such abuses by the courts would nullify the demand requirement and would unnecessarily burden both corporations and the courts with expensive and unnecessary litigation.

In the present cases the deposition of counsel for respondent Papilsky and the other proceedings below show that both respondents engaged in such abuses in that they made up sham allegations that the unaffiliated directors of the Fund are dominated and controlled. Respondents' briefs imply that this fact is not relevant to this proceeding. Their position requires a brief further description of the proceedings below.

Petitioners moved in the District Court for dismissal of the complaints for failure to comply with the demand requirement. In an affidavit and in memoranda in support of this motion they highlighted the sham nature of the allegations of domination and control. Attached hereto is a short supplementary appendix ("SA") reprinting excerpts from petitioners' main memorandum supporting the motion (SA-1). They show that the position that these allegations were sham and should be stricken was not buried or obscured but rather was perhaps the most prominent point in the whole memorandum. Also reprinted in the supplemental appendix are certain paragraphs from petitioners' affidavit supporting the same point (SA-5). In their opposing papers respondents made no effort to show that they had any factual or other basis for the allegations beyond the insufficient basis asserted in the deposition of Papilsky's counsel.

Petitioners' position that the allegations should be stricken was considered and rejected by the District Judge who suggested at the oral argument that it is a fundamental part of federal jurisprudence that factual allegations contained in complaints can never be dismissed before trial on a showing that plaintiffs have no factual support for them (A-29). He refused to look behind the allegations of the complaint and held in his written opinion that the supporting affidavits and the

deposition of counsel should not be considered on any aspect of the demand question (A-35—A-37). The effect of this decision was to permit respondents, who had no basis for by-passing the Fund's duly elected unaffiliated directors, to force the Fund into a litigation which these directors had no chance to consider.

It is undisputed that under the business judgment aspect of the director demand rule the unaffiliated directors of Fund would normally decide whether the Fund should sue and that their decision would bind all shareholders unless these directors are somehow disqualified. Yet, by not inquiring into the question of disqualification at the outset and by instead allowing the case to proceed, the District Court in effect presumed that respondents' allegations were true and that the unaffiliated directors were controlled. This presumption may cause the Fund and the great majority of its shareholders to suffer losses which can never be recovered.

Consequently, to avoid this irreparable harm, petitioners appealed to the Court of Appeals for the Second Circuit under the collateral right doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949). Petitioners asked the Court of Appeals to decide the fundamental question whether the District Court had the power and duty to look at the petitioners' affidavit and the deposition of Papilsky's counsel and to determine whether the allegedly disqualifying allegations were sham and could be disregarded. This can be seen from a few excerpts from petitioners' briefs to the Court of Appeals which are also annexed hereto (SA-10—SA-16).

The Court of Appeals dismissed the appeal for lack of appellate jurisdiction. We asked this Court to grant certiorari for three reasons. These reasons are restated below together with brief discussions of respondents' arguments relating to each.

REASONS FOR GRANTING THE WRIT

I. Certiorari should be granted because the Court of Appeals decision is in conflict with the collateral right doctrine established by this Court in *Cohen* v. *Beneficial Industrial Loan Corp.*

At pp. 11-15 of our petition we show that the dismissal of petitioner's appeal by the court below conflicts with this Court's decision in *Cohen* v. *Beneficial Industrial Loan Corp., supra,* and that this Court should correct this conflict. Respondents attempt to distinguish *Cohen* and justify the action of the Court of Appeals by implying that the only question raised and decided on the demand issue in the courts below was whether the complaints were sufficiently particularized. However, these arguments are of no avail because the Court of Appeals was not merely asked to review the particularity of a pleading. It was asked also to consider the more basic question whether the District Court has the power and duty to look behind allegations purportedly excusing demand where a serious showing is made that plaintiffs had no factual basis for making them.

This latter question is separable from and collateral to the resolution of the merits of the alleged corporate claim because either can be decided without regard to the outcome of the other. The District Court's decision not to look behind the allegations was a final disposition of the question of its power and duty. An immediate appeal from its decision on this point is necessary to protect the corporation's right not to be forced improperly into unwise litigation, a right which is particularly difficult for the corporation to protect after a trial regardless of the outcome. The issue is important because if such sham allegations are allowed to stand until trial they may convert a procedure de-

signed to protect corporations into a procedure which harms them.

As shown by the discussion on pp. 11-15 of the Petition, there is no doubt that whether the District Court has the power and duty to deal with such abuses is an issue which calls for the application of the *Cohen* rule. Certiorari should be granted because the decision of the Courts of Appeals is in direct conflict with that rule.

II. Certiorari should be granted because the Court of Appeals decision is in conflict with the business judgment aspect of the Director Demand Rule established in prior decisions of this Court and other federal courts.

There would be little point to the requirement of Rule 23.1 that demand be made before suit is brought if the shareholder could always maintain a derivative suit after the demand has been rejected. In our petition (pp. 15-18) we show that it is well established in decisions of this Court and other courts that a shareholder may not sue after a demand is refused except in a case where the directors are disqualified from deciding against the suit. Levine cites two cases on this subject, neither of which detracts from this rule because in both cases shareholders were allowed to proceed only where the directors were in favor of the suit (Levine Brief, p. 3). They in no way conflict with the general rule that the shareholder may not proceed where the directors are against the suit and are not disqualified.

In our petition we show that the Court of Appeals decision was based on the presumption that the law on this subject is contrary to this well-established rule. Neither respondents nor the Court of Appeals offered any support for this presumption. Because of the im-

pact such a change could have on all derivative litigation, it is important that this Court act to correct this substantial departure from previous decisions of this and other Courts.

III. Certiorari should be granted because the Court of Appeals refused to review an erroneous decision of the District Court which is in conflict with a decision in the Court of Appeals for another Circuit and which it should be required to review in order to avoid abuse of the derivative suit process.

Respondent Papilsky's discussion of the District Court decision (Papilsky Brief, p. 16) is based on the assumption that respondents' allegations relating to the unaffiliated directors should have been accepted as true by the District Court. She is thereby asking this Court to assume the answer to the very question presented to the District Court and the Court of Appeals, viz. whether the District Court can and should inquire into respondents' right to make these allegations and whether the allegations should have been disregarded and stricken in view of petitioners' uncontradicted showing that respondents have no factual basis for them. It is now necessary for this Court to require the Court of Appeals to decide petitioners' appeal to prevent further abuse of the derivative suit process.*

---

* Respondent Papilsky now claims that the petition should be denied because the motion before the District Court was not filed simultaneously with the earlier motion to dismiss based upon res judicata which had been certified for interlocutory appeal by Judge Wyatt on his own motion. This contention is surprising because of the stipulation agreed on by Papilsky at the outset of the case (and reprinted in part at SA-17) that other motions could be held in abeyance pending the resolution of the res judicata issue in the Court of Appeals. Nor can there be any claim that the demand motion was dilatory since another Court of Appeals has already in effect pointed out its disagreement with the decision of the District Court in the instant cases on the very motion involved in this petition. *In Re Kauffman Mutual Fund Actions*, 479 F.2d 257, 266 n.6 (1st Cir.), *cert. denied*, 414 U.S. 857 (1973).

Conclusion

For the foregoing reasons and those stated in the petition, the writ should be granted.

Dated: New York, New York
December 3, 1974

Respectfully submitted,

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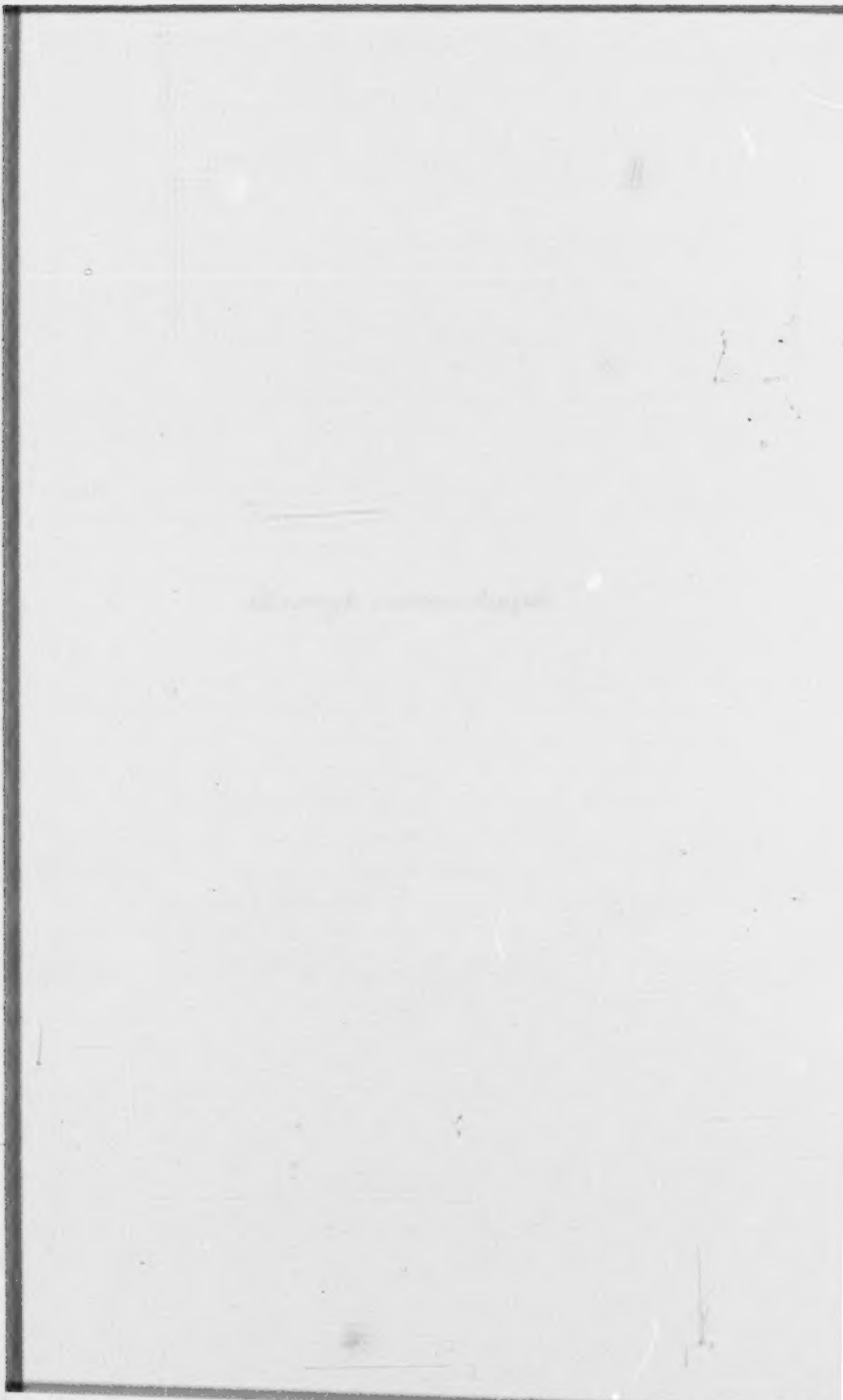
Supplementary Appendix



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Supplementary Appendix

SA-1

Excerpts From pp. 28-29 and 35-36 of Defendants' Memorandum in Support of Their Motions to Strike and to Dismiss the Complaints Filed in the Southern District of New York on February 2, 1973

"B. In any event there is no evidentiary basis for the allegations of domination and control which should be stricken pursuant to Rules 11 and 23.1.

"The failure of plaintiffs to particularize their allegations concerning domination and control does not arise from any inability to draft a pleading. Rather it represents the complete lack of evidence of control.

"As the S.E.C. observed in *In the Matter of Fundamental Investors, Inc.*, 41 S.E.C. 285, 294 (1962), 'The burden of overturning the presumption against control of a natural person is not one that will be lightly assumed or easily carried to success.' In construing the effect of a statutory presumption courts have held that it can be overcome only by proof of actual domination. *Acampora* v. *Birkland*, 220 F. Supp. 527, 543 (D. Colo. 1963). See also *Rome* v. *Archer*, 41 Del. Ch. 404, 197 A.2d 49 (1964); *Phillips* v. *S.E.C.*, 388 F.2d 964 (2d Cir. 1968).

"The documents relied upon by Mr. Pomerantz, including the Fund's proxy statements and prospectuses, show that during the period of the complaints the Fund had three affiliated directors. They also show that at all relevant times a majority of the Fund's Board consisted of directors not so affiliated. There is no evidence that any of the unaffiliated directors were [28] anything other than independent men of affairs who always acted as best they could for the benefit of the shareholders. (Parsons Aff., paras. 17-18)

"Mr. Pomerantz' deposition revealed that there is really no basis at all for the control allegations. The only theory plaintiffs have to support them is the bootstraps

Excerpts From pp. 28-29 and 35-36 of Defendants' Memorandum in Support of Their Motions to Strike and to Dismiss the Complaints Filed in the Southern District of New York on February 2, 1973

theory that the unaffiliated directors must have been dominated and controlled by defendants because they knew of the Fund's practices concerning 'give-ups' and 'reciprocals'. (*Id.*)

"However, for the following reasons, the fact that 'give-ups' and 'reciprocals' were used to stimulate sales of Fund shares and to obtain information raises no inference of control which could possibly be sufficient to overcome the statutory presumption that these directors were not controlled:

". . . [Omitted here is a detailed discussion of why the deposition of Papilsky's counsel shows the lack of any factual basis for the allegations of domination and control.]

"[35] In view of all of these reasonable possibilities plaintiffs have no evidentiary basis for claiming contrary to the statutory presumption that the failure of the independent directors to insist upon recapturing give-ups was the result of any domination or control. Therefore, for the reasons set forth in Part I, *supra*, the allegations containing domination and control should be stricken from the complaint pursuant to Rules 11 and 23.1 and for this additional reason plaintiffs have failed to meet the requirement that they properly plead with particularity their reasons for failing to make a demand.

• • •

"Plaintiffs seek to avoid the demand requirement by naming unaffiliated directors as defendants and claiming that no demand is necessary because the proposed action, if controlled by them, would be placed in 'hostile' hands

Excerpts From pp. 28-29 and 35-36 of Defendants' Memorandum in Support of Their Motions to Strike and to Dismiss the Complaints Filed in the Southern District of New York on February 2, 1973

(Papilsky Comp., para. 19(c); Levine Comp., para. 29). This device though convenient, is unavailing in the absence of any properly pleaded and particularized allegation of domination and control. The transparency of the device is shown by the failure of both plaintiffs to serve any of the unaffiliated directors (Parsons Aff., para. 2). In the absence of any support for the contention that the unaffiliated directors participated or acquiesced as a result of their alleged domination by other defendants, the allegations naming them as defendants should be stricken pursuant to Rules 11 and 23.1. In any event it is clear that the mere naming them as defendants does not excuse the demand requirement as was recently held in *Lerman* v. *ITB Management* [36] *Corp., supra* at pages 12 and 13 of the opinion submitted herewith:

> 'The requirements of Rule 23.1 are clear and unambiguous. Their usefulness has been acknowledged and analyzed on numerous occasions. To be excused from these requirements a party must demonstrate with at least some particularity that a demand upon those in authority would be a futile gesture. The rule's standard of 'particularity' is not met by assertions of generality. To permit a lesser standard would be to encourage boilerplate efforts at avoidance in all derivative suits.'

"A further attempt to avoid the demand requirement is the allegation in the Levine complaint (para. 25) that the unaffiliated directors did not know of the possibility of recapture. However, this allegation provides no basis for circumventing the demand rule since one of its purposes is to inform the directors of the existence of a possible cause of action prior to the institution of suit by the shareholder.

Supplementary Appendix

SA-4

Excerpts From pp. 28-29 and 35-36 of Defendants' Memorandum in Support of Their Motions to Strike and to Dismiss the Complaints Filed in the Southern District of New York on February 2, 1973

"Plaintiff's vaguely pleaded allegations of domination and control do not particularize reasons for not making the effort required by Rule 23.1 and, in any event, these allegations should be stricken pursuant to Rules 11 and 23.1 because there is no good ground or reasonable basis for them. Pursuant to Rule 41(b), the complaints should be dismissed for the failure to comply with the demand requirement of Rule 23.1."

Supplementary Appendix

SA-5

Excerpts From pp. 12-17 of the Affidavit of Judson A. Parsons, Jr., in Support of the Motion to Strike and to Dismiss the Complaints filed in the Southern District of New York on February 2, 1973

"17. *Alleged Control of the Unaffiliated Directors.* The Papilsky Complaint alleges that three directors of the Fund, Driscoll, Trevor and Berndt, were also partners in the Company, and that these 'affiliated' directors controlled the entire board of the Fund (Exh. A at 13, 14). However, Mr. Pomerantz has no information about any specific other directors (Exh. A at 24) except what is contained in the Fund's proxy statements and prospectuses which list the membership of the Board during the calendar years 1964-1971. The following chart compiles the information about Board membership contained in these documents which do not show that any directors other than the first three named were affiliated in any way with any defendant or with the Fund other than as members of the Fund Board.

"BOARD OF DIRECTORS OF THE FUND DURING THE CALENDAR YEARS 1965-1971

Director	*Period in Which Served as Director*	*Principal Occupation*
"Robert S. Driscoll	1949-1972	President of the Fund and Partner of the Company
"Paul W. H. Trevor	1961-1972	Executive Vice President of the Fund and Partner of the Company
"Alvin H. Berndt	1965-1972	Vice President of the Fund and partner of the Company
"Carl W. Knobloch	1944-1972	Estate management

Supplementary Appendix

SA-6

Excerpts From pp. 12-17 of the Affidavit of Judson A. Parsons, Jr., in Support of the Motion to Strike and to Dismiss the Complaints filed in the Southern District of New York on February 2, 1973

Director	*Period in Which Served as Director*	*Principal Occupation*
"James H. Potter	1964-1972	George Meade Bond Professor at Stevens Institute of Technology
"Paul Windels, Jr.	1966-1972	Partner of law firm of Windels Merritt & Ingraham
"Glen A. Lloyd	1960-1971	Partner of law firm of Bell, Boyd, Lloyd, Haddad & Burns
"Julian B. Beaty	1954-1970	Senior Partner of law firm of Reeves, Todd, Ely & Beaty
"Henry R. Johnston	1954-1970	Trustee, Committee for Economic Development
"Harry V. Moser (Deceased)	1941-1966	President of Harry V. Moser, Inc., Real Estate Management
"Noel B. MacLean	1971-1972	Former chairman of the Board of Edo Corporation, manufacturers of naval and aircraft navigation systems and related equipment with which he has been associated for over 5 years. Since April, 1972 he has continued as Director-Consultant of such Company.

"These documents show that there were 9 members during 1965-1969 and 7 members during 1970-1971, that the affiliated directors were only a minority of three during both periods and that the majority was made up of unaffiliated directors.

Excerpts From pp. 12-17 of the Affidavit of Judson A. Parsons, Jr., in Support of the Motion to Strike and to Dismiss the Complaints filed in the Southern District of New York on February 2, 1973

"18. Mr. Pomerantz said that he did not have any information relating to the control of any particular unaffiliated director and that he is really claiming that all were controlled.

> " 'Q. Does your reference to a majority refer to any particular unaffiliated directors or are you taking the position that just a majority of the Board must be as you previously stated [controlled]? A. I think it probably would be a more accurate formulation than the one I have here to amend that to say that not the majority but all of the unaffiliated directors have been dominated and, therefore, as a matter of law become considered affiliates of the management company.
>
> " 'The answer to your question more categorically is, I do not have in mind any specific people who are and specific people who are not. In my view they all were dominated, all of the affiliated directors.'' (Exh. A, p. 24, lines 3-16)

"The claim that the Board was controlled by the affiliated directors was said to have been based on three things: (Exh. A at 15-24)

"(a) The fact that the Fund did not 'recapture' brokerage commissions despite published criticism of the mutual fund industry generally (but not of Affiliated Fund specifically), with respect to the use of 'give-ups,' 'reciprocals' and 'interpositioning' (Exh. A at 15-18). However Mr. Pomerantz admitted having no information about the Board's deliberations concerning any such methods of using brokerage commissions. He claims only that the unaffiliated directors knew from public sources of the availability of recapture because it was much publicized in

Excerpts From pp. 12-17 of the Affidavit of Judson A. Parsons, Jr., in Support of the Motion to Strike and to Dismiss the Complaints filed in the Southern District of New York on February 2, 1973

financial publications and various reports on the mutual fund industry (Exh. A at 22-25, 77, 78).

"(b) The thought that there might be information about relationships based upon,

> '. . . a social or business connection between some of the affiliated directors and the unaffiliated directors. Here again I would want to verify my recollection on that point because I might be confused with other companies . . .' (Exh. A, p. 19, lines 17-22)

The subsequent letters from plaintiff's counsel constitute an admission that they have no information concerning social or business relationships between the affiliated and unaffiliated directors of Affiliated Fund (see Exh. B at 2).

"(c) The alleged fact (wholly unsupported by any evidence) that the Company's management fee schedule was never voluntarily reduced (Exh. A at 19), and the apparent thought that the management fee the Fund paid the Company was comparatively high in the industry. As Mr. Pomerantz said:

> 'Q. Were you aware of the fact that its management fee ratio for this fund is one of the lowest in the industry among the fifty largest open-end funds of its type? . . . Fee as a percentage of total assets of the Fund. A. The gross—you have defined it. I am not aware of it nor do I think it resembles the facts historically. You were a pretty large fund. I haven't kept up with you in recent years . . .' (Exh. A, p. 21, lines 1-15)

In fact the Fund's management fee ratio and expense ratio are among the lowest in the industry as shown by the following documents relied upon by Mr. Pomerantz: . . ."

Excerpts From pp. 12-17 of the Affidavit of Judson A. Parsons, Jr., in Support of the Motion to Strike and to Dismiss the Complaints filed in the Southern District of New York on February 2, 1973

[Detailed discussion contained in original omitted]

"19. *The Levine Complaint.* Although defendants have requested Levine's counsel to agree to some procedure whereby defendants could determine whether there was a 'reasonable basis' for the *Levine* Complaint or whether there was 'good ground' to support it, Levine's counsel has so far refused to do so."

Excerpts From pp. 19-20 of the Brief for Defendants-Appellants Lord, Abbett & Co., Robert S. Driscoll and Alvin H. Berndt filed in the United States Court of Appeals for the Second Circuit on October 17, 1973

"B. The Conclusory Allegations of Domination and Control Are Sham and Should Have Been Stricken from the Complaint and in any Event Are Not Pleaded with Sufficient Particularity to Comply with Rule 23.1

"Plaintiffs' first effort to disqualify the unaffiliated directors consists of conclusory allegations that they were dominated and controlled by the affiliated directors. Defendants took discovery to determine what, if any, evidentiary basis plaintiffs had for these allegations. In his deposition Mr. Pomerantz was asked what was known by plaintiffs about the unaffiliated directors. The answer was that all of what was known by plaintiffs was their identity as it appeared in the Fund's prospectus (*supra*, pp. 7-8)

"Section 2(a)(9) of the Investment Company Act, 15 U.S.C. § 80a-2(a)(9), which applied to these unaffiliated directors, states that 'a natural person shall be presumed not to be a controlled person within the meaning of this subchapter. . . .'* The admission of plaintiff's counsel makes it clear that plaintiffs have no basis for rebutting this presumption. The court below improperly denied defendants' motion to strike the allegations of domination and control since Mr. Pomerantz's considered admission established

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* As the S.E.C. observed in *In the Matter of Fundamental Investors, Inc.*, 41 S.E.C. 285, 294 (1962), 'The burden of overturning the presumption against control of a natural person is not one that will be lightly assumed or easily carried to success'. In construing the effect of the presumption, the courts have held that it can be overcome only by proof of actual domination. *Acampora* v. *Birkland*, 220 F. Supp. 527, 543 (D. Colo. 1963). *See also Rome* v. *Archer*, 41 Del. Ch. 404, 197 A.2d 49 (1964) and *Phillips* v. *S.E.C.*, 388 F.2d 964 (2d Cir. 1968).

Excerpts From pp. 19-20 of the Brief for Defendants Appellants Lord, Abbett & Co., Robert S. Driscoll and Alvin H. Berndt filed in the United States Court of Appeals for the Second Circuit on October 17, 1973

that they were not based upon 'reasonable beliefs growing out of careful investigation' as required by *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966), and hence were not properly verified as required by the first sentence of Rule 23.1. Moreover, they should have been stricken for the additional reason that they were made without the 'good ground' required by Rule 11, *Freeman* v. *Kirby*, 27 F.R.D. 395, 397 (S.D.N.Y. 1961); *Halpern* v. *Barran*, 272 A.2d 118, 120-121, 123-124 (Del. Ch, 1970)."

Excerpts from pp. 16-19 of the Reply Brief for Defendants-Appellants Lord, Abbett & Co., Robert S. Driscoll and Alvin H. Berndt Filed in the United States Court of Appeals for the Second Circuit on December 5, 1973

"Where the complaints are held to contain allegations of sufficient 'particularity' (as was erroneously held by the court below), the court need not always resign itself to a trial and the possibility of an abuse of a procedure designed to help the corporation. Rather the court's preliminary inquiry should probe considerably further if the plaintiff's underlying factual basis for making the allegations is seriously questioned by defendants. Pursuant to the verification requirement of Rule 23.1, the court should determine whether the plaintiffs have a reasonable factual basis—a 'reasonable belief growing out of careful investigations'*—for making allegations. No less is required by Rule 11 of the Federal Rules of Civil Procedure which requires that a pleading not be signed by an attorney unless he has 'good ground' for making the allegation. (See Lord, Abbett Br., pp. 6, 20.) Where the basis for the allegations fails to meet this test, the allegations should be stricken and the case dismissed on the ground that the shareholder has failed to comply with the 'particularity' requirement of Rule 23.1 and therefore has no standing to bring the action.

"A similar procedure was used in *Landy* v. *FDIC*, 17 Fed. Rules Serv. 2d 769 (3d Cir. 1973), where the court went into the facts in considerable detail to determine whether there was a disqualifying conflict of interest between FDIC, the receiver of a bank, and the defendants which a bank shareholder wished to sue derivately. It held that no such

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* The standard for the verification requirement of Rule 23.1 articulated in *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966).

conflict existed on the record before it and remanded to the district court for a further determination of this question in the light of subsequent events. District courts also looked beyond the allegations of disqualification contained in the complaints in *DeHaas* v. *Empire Petroleum Co.*, 435 F.2d 1223 (10th Cir. 1970); *DePinto* v. *Provident Security L. Ins. Co.*, 323 F.2d 826 (9th Cir. 1963), *cert. den.*, 376 U.S. 950 (1964); *Lerman* v. *ITB Management Corp.*, 58 F.R.D. 153 (D.Mass. 1973).*

"In the present cases, it was particularly important that the court look beyond the pleadings in view of what the record showed about plaintiffs' lack of a basis for their disqualification claims.

"None of the cases cited by plaintiffs is in any way to the contrary. For example, the numerous cases in which complaints contained particularized allegations of wrongdoing by, or control over, boards of directors and in which the presence of a reasonable basis for such allegations was not questioned, have nothing to do with this case.** There is also no sense in Papilsky's reliance upon Judge Friendly's com-

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* Judge Weinfeld's statement in *Dopp* v. *American Electronic Labs., Inc.*, 55 F.R.D. 151, 153 n.3 (S.D.N.Y. 1972), that he need not look at affidavits submitted in support of a demand motion has no bearing here because the affidavits did not purport to show that plaintiff had no reasonable basis or good ground for making the disqualifying allegations upon which he relied. Similarly, the suggestion made in *DePinto* that demand motions ordinarily are decided solely on the pleadings does not apply here because in the ordinary case defendants fail to make an inquiry into the basis for the plaintiff's allegations and place the results of that inquiry before the court.

** There is nothing in the opinions in *Craftsman Finance & Mortgage Co.* v. *Brown*, 64 F. Supp. 168 (S.D.N.Y. 1945) (the majority of the board were alleged to have personally profited from numerous mis-

ment in *Rosenfeld* v. *Black*, 445 F.2d 1337, 1347, n. 14 (1971), which she quotes as follows:

> '. . . in a practical sense, . . . the adviser ordinarily dominates the fund and its directors . . .' (Papilsky Br., pp. 42-43),

and which is wrenched completely out of context in a misleading way. Papilsky neglects to point out that the passage quoted by her is immediately preceded by the word 'While', which suggests that this clause may be a prelude to a statement of a contrary position. This suggestion is confirmed by an examination of the entire footnote, which lists reasons why unaffiliated directors should not be expected to abdicate their statutory functions and supports a preliminary conclusion that it is 'hard to accept' any such expectation.

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appropriations of corporate opportunities set forth in detail in the complaint); *Eads* v. *Garcia & Diaz, Inc.*, 17 F.R.D. 317 (S.D.N.Y. 1955) (neither the nature of the cause of action nor the allegations excusing demand are described in the opinion); *Carruthers* v. *Jack Waite Mining Co.*, 14 F.R.D. 475 (S.D.N.Y. 1953) (the directors were alleged to have consistently paid little attention to the corporation's affairs); or *Heilbrunn et al.* v. *Hanover Equities Corporation et al.*, 259 F. Supp. 936 (S.D.N.Y. 1966) (the self interested defendants owned a majority of the corporation's stock), to suggest that the allegations in those cases were unparticularized or that any effort was made to refute them in a manner similar to that used in the present cases.

The same is true of *Meltzer* v. *Atlantic Research Corp.*, 330 F.2d 946 (4th Cir.) *cert. denied* 379 U.S. 841 (1964), where two self-interested directors owned at least 40% of the corporation's otherwise widely distributed stock and where allegations of serious nonfeasance on the part of the other directors were not denied. In *Winkelman* v. *General Motors Corporation*, 44 F. Supp. 960 (S.D.N.Y. 1942), a majority of the directors would personally profit from the complained of acts.

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Indeed, such expectations would be contrary to the command of the Investment Company Act that natural persons should not be presumed to be controlled by anyone (15 U.S.C. § 80a-2(a)(9); see Lord Abbett Br., pp. 19-23).

"Nor will it do to argue, contrary to Rule 23.1 and Rule 11, that the plaintiffs as outsiders are not privy to relationships among directors and therefore should not be required to have an evidentiary basis before bringing litigation. As shareholders, plaintiffs have rights to obtain information from the corporation without bringing suit. 5 Fletcher, Cyclopedia of Corporations, §§ 2213, 2225 (1967 Revised Ed.). Further, if they had followed the demand procedure in this case or asked the appropriate questions in connection with it, they might also have received substantial information. Not having followed the demand procedure or asked the questions, they should not now be permitted to complain that they are uninformed about the relationships.

"Plaintiffs' claims that they need discovery to controvert defendant's showing are further bootstrapping. Their assertions of such need (Papilsky Br., pp. 7-8; Levine Br., pp. 24-25) constitute admissions that they had no basis for including the conclusory allegations of disqualification in their respective complaints.

"*In re Kauffman Mutual Fund Actions*, 479 F.2d 257 (1st Cir.), *cert. denied*, ____ U.S. ____ (1973) and the other cases discussed in our main brief make it clear that plaintiffs cannot avoid the demand requirement by their unsupported assertions that the unaffiliated directors were dominated and controlled by the Lord Abbett defendants and that they were wrongdoers. A litigant who delib-

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erately insults a judge may not require the judge to recuse himself because the judge may be presumed to resent the insult. See *In re Union Leader Corp.*, 292 F.2d 381 (1st Cir. 1961); cf., *Mirra* v. *United States*, 379 F.2d 782 (2d Cir.), *cert. denied*, 389 U.S. 1022 (1967). Plaintiffs should have no more success in their efforts to disqualify the unaffiliated directors. The District Court erred in not granting defendants' motion to dismiss for plaintiffs' failure and inability to comply with the particularity requirement of Rule 23.1."

Excerpts From Stipulation Dated December 14, 1971

"IT IS HEREBY STIPULATED, CONSENTED AND AGREED that the time for the above-named defendants and for defendant Affiliated Fund, Inc. to answer the complaint or to make other motions addressed thereto (if and to the extent that the complaint is not dismissed as a result of the aforesaid motion and the appeal sought to be taken from its denial) is extended to and including:

(1) In the event said Petition for permission to appeal is denied, 20 days following entry of the order of the Court of Appeals denying said Petition; or

(2) In the event such Petition is granted, 20 days following the issuance of the mandate of the Court of Appeals after entry of Judgment by said Court."